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VILLAGE OF OAK PARK, a Municipal Corporation,

[redacted]

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 194

ANGELINE DEBARTOLO,

Petitioner,

vs.

VILLAGE OF OAK PARK, A MUNICIPAL CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Justices of the Supreme Court of the United States:

Your petitioner Angeline DeBartolo, a widow, respectfully represents unto this Honorable Court that she is a citizen of the United States and a resident of the Village of Oak Park, County of Cook and State of Illinois, and is the owner of the property here involved known as 1181 South Lyman Avenue in said Village of Oak Park, Illinois.

The judgment here sought to have reviewed was entered by the Supreme Court of Illinois, the highest judicial tribunal of the said State.

The action in the trial court was for an injunction to restrain said Village of Oak Park from enforcing certain

provisions of its zoning ordinance as against petitioner and her property.

The trial court decreed that the provision of the ordinance challenged, was, as applied to petitioner's property, arbitrary and unreasonable and therefore, unconstitutional and void.

The trial court certified that the validity of an ordinance was involved and appeal was taken directly to the Supreme Court of Illinois.

The Supreme Court of Illinois reversed the decree of the trial court, holding that the enforcement of said zoning ordinance, as applied to petitioner's property, did not deprive her of her constitutional rights.

Summary Statement of the Matter Involved

The zoning ordinance in question was enacted by the Village of Oak Park in 1921 and placed petitioner's property in a one-family residence zone. The building as it now exists was then on the property.

A family as defined by said ordinance is "any number of individuals living and cooking together as a single housekeeping unit".

The building was so designed and constructed that its second floor would approximate the floor space of the first floor, and the head room of the second floor due to the roof structure, would approximate that of the first floor (See pictures Transcript pages 49 and 55).

When constructed, the interior of the second floor was not completely finished. The builder finished only one front room upstairs with a stairway leading to it from an inside hallway at the front door.

In 1944 petitioner's daughter became engaged to a returning soldier, and petitioner, desiring to complete the second floor of said building, so as to make it appropriate for a second family unit, and thereby accommodate her

daughter, who was soon to be married to a returned soldier, applied to the proper municipal authorities for leave to finish the upstairs portion of said building and filed the necessary sketches and architectural designs as provided by the building code of said Village.

The design as filed with the building commissioner of said Village provided for a kitchen, bedroom and bath with toilet facilities, in addition to the room already there, with the necessary plumbing, lighting, water, and usual accessories. It also provided for a dormer window to be cut and built into the roof in the southern exposure thereof, and an outside entrance, porch and stairway in the rear. Said design was prepared by an architect, and complied with all requirements of the building ordinances of said Village; and, as designed, there was no objection to the building, if so completed, except insofar as it might be said to be in violation of said zoning ordinance—in this—that the building when completed would be adapted to the use of a separate unit of the family.

Upon the sole ground that the building so arranged would violate said provision of the zoning ordinance, the building commissioner of the Village refused a permit to petitioner to so complete the building, and the Zoning Board and Village Board of Trustees upheld the building commissioner in his stand.

Petitioner's Complaint

Petitioner, believing that by such construction of the zoning ordinance by the Village officials, she was being deprived of her property rights without compensation and without due process of law, filed her said Complaint so alleging, and prayed for an injunction to restrain the said Village from interference with her rights to complete the upstairs of her building.

Petitioner in her complaint alleged that when said ordinance was passed said building existed in its then condition and was potentially adaptable for occupancy by more than one family; and that the additional rooms were necessary for use of her daughter who was about to marry an ex-serviceman; and that the restriction in the zoning ordinance, insofar as they prohibited petitioner's use of her building for the accommodation of another family unit were not essential to public health, or general welfare, or safety from fire, and other dangers (Tr. 8); that, insofar as said ordinance prohibits the use of petitioner's property for such purposes, it takes petitioner's property without compensation, deprives her of her property without due process of law, and equal protection of the laws, and is accordingly repugnant to the Federal Constitution and therefore void (Tr. 4, 9).

Petitioner charged that the restriction in the ordinance, as applied by the Village to petitioner's specific existing building, was arbitrary, capricious and unreasonable and bore no rational relation to the protection of public health, morals, safety and general welfare, and as applied to petitioner's property was void (Tr. 10); and petitioner prayed that the enforcement of said ordinance against petitioner's property insofar as it prohibited her from so using it, be enjoined.

Answer of Defendant Village

The answer of the Village of Oak Park was negative, denying the materiality and relevancy of the facts alleged in petitioner's complaint and claimed that

> "it is the duty of its officers to uphold the zoning laws of the Village of Oak Park and to enforce them to prevent encroachments which blight and destroy neighborhoods by permitting violations contrary to the intent of the zoning laws," (Tr. 14).

thereby inferentially claiming that the proposed completion and use of petitioner's building, with a second kitchen, would blight and injuriously affect the neighborhood and the territory as zoned.

The Controlling Facts

The controlling facts are not in dispute.

The zoning ordinance in question, enacted by the Village of Oak Park on September 21, 1921, placed petitioner's said property in a zone created as Zone "A" to be thereafter restricted, as to residence purposes, to the use of one-family residences only.

The dominant facts are of a physical nature, and are not controversial. The building involved is located near the Southeast corner of the Village, at 1811 South Lyman Avenue. The second block East of Lyman Avenue is Austin Boulevard, which is the East boundary of the Village of Oak Park, adjoining the City of Chicago. Austin Boulevard, including the Oak Park side of said street is zoned for apartment houses, hotels and multiple dwellings.

Plaintiff's house is located on a lot 42 feet wide. Immediately South of plaintiff's property is another building on a lot 33 feet wide, and adjoining this lot, a 16 foot alley running East and West separates the Zone "A" district from the commercial district, which is forty-nine feet South of plaintiff's property. At this point is located a gasoline filling station. Across the street from this gasoline filling station is a building 100x125 feet occupied by bowling alleys and lunchroom. This property, and the other commercial district zone properties, front Roosevelt Road, an East and West State Highway (Tr. of Record P. 51).

Roosevelt Road is a highly travelled thoroughfare, and is the boundary between the Village of Oak Park and the Town of Cicero, lying South of said Village of Oak Park.

Two and one-half blocks to the North of plaintiff's property, Lyman Avenue is intersected by Garfield Street, an East and West street, also zoned for apartments and other multiple dwellings. Along the North side of said Garfield Street and parallel thereto are located the railroad tracks and right of way of the B. & O. Railroad, and the Aurora & Elgin Railroad.

In the same street as plaintiff's property (and within the block) are four buildings occupied by more than one family; two of these on the same side of the street, 1163 and 1171 Lyman Avenue, and two on the other side of the street at 1152 and 1168 South Lyman Avenue. Three of these are occupied by two separate families each, and one is occupied by three separate families (Tr. P. 25).

The streets next East and West from Lyman Avenue, being Humphrey Avenue and Taylor Avenue respectively, and between Fillmore Street and the alley (being the rear of properties on Roosevelt Road), have respectively 7 and 5 buildings occupied by two families.

Lombard Avenue, the next street west of Taylor Avenue, contains a row of 7 regular brick two-flat buildings, containing separate apartments and occupied by separate families, namely, 1123 to 1136 Lombard Avenue (Tr. P. 32-33).

The residences on Lyman Avenue are largely of a two story, or story and half type, and some three story buildings. (See picture of building at 1185 Lyman Avenue, with dormer window, Tr. 51, and 53, 55, 57 and 59).

Thus it is seen that this one-family residence zone is spotted throughout with two and three family dwellings and bordered with apartments and business zones.

The Village of Oak Park is an adjoining suburb of Chicago, that has grown up with it and is and has been, for some thirty years, a closely built-up territory with well defined business districts and residential territories. It lies against the compactly built-up Western line of Chi-

cago and is served by two boulevards and three arterial highways with streetcar lines, all East and West bound leading into and out of Chicago. Oak Park, in dimensions, is three miles North and South and a mile and half East and West and has a population of 66,015, according to the 1940 census.

When the Village of Oak Park passed its zoning ordinance in 1921 it was and had been for many years, a developed community and the ordinance was adapted to sections of the municipality as they had naturally developed without planning.

The particular tract here involved covers a section of the Villlage containing about 39 blocks and lies in the Southeast corner of said Village.

At the time this district was zoned, it was practically fully built up, and no particular type of house existed in the zone, but residences equipped with facilities for one-family use were predominant in the Lyman Avenue Block in question. But many of the two story houses are equipped for two-family uses. The different types of houses on the street are shown by the pictures. (See Tr. 49, 53, 55, 57, 59.) But those houses had been fully completed, some of which were arranged for two and three family uses when the ordinance was passed, with no external indication of their actual use but with indications of their adaptability or potential use as two-family residences.

The Illinois Statute Authorizing Zoning of Municipalities

The Illinois statute under the authority of which the Oak Park ordinance was passed provides that its objective is adequate light, pure air, safety from fire and other dangers and to otherwise promote public health, safety, comfort, morals and welfare.

Provisions of the Ordinance

The ordinance in question provides as follows:

> "Sec. 35.930. Residence District "A": In Residence District 'A', the purposes permitted are for one or more of the following uses:
>
> "1. Dwellings, provided also that such dwellings shall be arranged and designed for the exclusive use of only one family."

In the Zone "A" district one or more of the following purposes are allowed: (1) one family dwellings; (2) churches; (3) educational institutions; (4) rights of way; (5) passenger stations; (6) parks, playgrounds, village community centers; (7) public libraries; (8) police and fire departments; (9) streets and alleys; (10) incidental accessory uses, including home occupations, etc.

Nonconforming Uses May Be Continued and Nonconforming Buildings May Be Completed

The ordinance further provides as follows:

> "Sec. 35.934; The lawful use existing at the time this ordinance takes effect of a building or premises may be continued, although such use does not conform with the provisions thereof."
>
> "Any building existing at the time that this ordinance takes effect, arranged or designed, or at that time devoted to a non-conforming use may be reconstructed or structurally altered, provided such structural alterations shall cost an amount not to exceed fifty (50) per cent of the value of the building, and provided also that the building shall not be enlarged unless the use thereof is changed to a conforming use."

Sec. 35.09 (26) of the Oak Park Ordinance defines a family as follows:

> "A family is any number of individuals living and cooking together on the premises as a single housekeeping unit."

It is pointed out that the "one-family" classsification under the Oak Park ordinance, places no limitation on the number of persons, nor that they actually need be members of the same family; while in addition thereto, the owner may legally lodge and board four persons for remuneration upon the premises located in the "A" one-family district, and specifically in plaintiff's property; for the Oak Park ordinance Sec. 35.09 (12) defines a boardinghouse placed in zone "B" to be as follows:

> "A building other than a hotel where lodging and meals for *five (5) or more* persons, but not exceeding twenty (20) persons are provided for compensation * * *."

Sec. 35.945 provides that:

> "After a public hearing before the Board of Appeals, the President and Board of Trustees may by ordinance determine and vary the application of any of the regulations of this Article in harmony with the general purpose and intent of such regulations relating to the use, construction or alteration of buildings or the use of land in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any of such regulations."

It is pointed out that the design of petitioner's building, as is shown by the photographs (Tr. 49, 55), indicates an arrangement of the roof structure so that the second story could reasonably accommodate facilities for a second family unit, the same as on the first; and that the Village made no objection, when applied to for a permit, or at any time, to

the architect's design and arrangement of the rooms on the second floor, except as to the kitchen, the objection being to the proposed use; and it is tacitly conceded that the design of the house and its structure, tolerates the purpose for which petitioner proposes to arrange and complete it.

The Decree of the Trial Court

The trial court based its decree upon the general circumstances and consideration of the permissible uses and general scope of the ordinance, and held that the provisions of the ordinance restricting the property as to one-family use, as applied to petitioner's residence, had no rational relation to the public health, morals, safety or general welfare.

The trial court found that the first floor of the property of plaintiff consists of six rooms with a front hall stairway leading to the second floor, and that the second floor contains one finished room and the balance is unfinished, and available for additional rooms on said second floor.

The trial court further found that in the same block as the property of the plaintiff at 1163 and 1171 Lyman Avenue are 2 two-story buildings containing two flats, each flat occupied by separate families; and at 1152 Lyman Avenue is a large brick building containing three separate apartments; that the streets next East and West of said Lyman Avenue, being, respectively, Taylor Avenue and Humphrey Avenue, contain various two-flat, two apartment buildings; that on Lombard Avenue, being the next street West of Taylor Avenue, are located 7 regular, definite two-flat brick buildings and occupied by two separate families, the same being Nos. 1120-36 S. Lombard Avenue.

The trial court further found that there will be no material or substantial change in the plaintiff's property, its structure, or outward appearance, in allowing plaintiff

to complete the construction of an apartment on the second floor of her property, and while it will enhance the value of the property of plaintiff, and improve the same to its highest and best purpose and urgent need, it will not in any wise or manner affect the character of the neighborhood, or decrease the value of the premises near by or in the vicinity.

The decree found that the restrictions in the zoning ordinance, insofar as they prohibit the use of plaintiff's property for use as a two-family residence, are not necessary to the end that adequate light, pure air, safety from fire and other dangers may be preserved, or to the end that the taxable value of any land or building in said area may be conserved, or that congestion in the public streets of said Village may be lessened or avoided, or that the public health or general welfare may otherwise be promoted.

The decree enjoined the enforcement of the restriction in the ordinance as against petitioner's building.

Contentions of the Parties in the Supreme Court of Illinois

CONTENTIONS OF THE VILLAGE

The Village, on appeal, contended in the Supreme Court of Illinois that petitioner was making a general attack upon the zoning ordinance as a whole, and solely because apartment buildings were located in the same block and on other streets and the property was near the commercial district, and because the gasoline filling station and bowling alley were at the street intersection 49 feet South of the plaintiff's property.

Those were *feigned issues* and were not the contentions of petitioner.

CONTENTIONS OF PETITIONER

The ordinance as a whole was not questioned by petitioner. Neither the power of the Municipality to enact the

general zoning ordinance, nor the propriety of zoning Roosevelt Road 49 feet South of plaintiff's building, as a commercial district, were questioned.

The propositions advanced by petitioner in the Illinois Supreme Court by which to sustain the decree of the trial court were in substance that petitioner was entitled as of right to complete her building as designed and adapted and for any purpose within mental contemplation compatible with its design; that completion of said building was in harmony with the scope of the ordinance covering the district and permissible uses thereunder; and that the present housing shortage justified a liberal construction of the ordinance.

It was pointed out that it was not contended by the Village that the completion of the upstairs to accommodate another family unit would alter any existing status or burden existing facilities, or have any injurious effect on the zone or health, safety, morals or general welfare; that no objection was made by any property owner, and that the denial by the Village of leave to complete the building, as obviously designed and adapted, was arbitrary, unreasonable and the ordinance, so construed, void; and it was urged that the ordinance, as being enforced as to petitioner's building, bore no direct or substantial relation to the preservation of the public health, safety, morals, or general welfare; and that the Village made no showing by answer or evidence that the proposed completion of the upstairs would objectively or otherwise change or affect existing conditions.

Opinion of the Supreme Court of Illinois

The Supreme Court in its opinion disposes of the petitioner's contentions that her building could be regarded as potentially designed for completion as requested by stat-

ing that the evidence does not sustain her contention, and that:

> "to say that it was architecturally designed for an apartment on the second floor is not sustained by the record. It is simply an ordinary one-story residence with one room finished in the attic" (Tr. 66).

But, this Court will note the height and shape of the second floor of petitioner's building as compared to the ordinary one-story residence and attic on either side of it (Tr. 49-55). The answer is that the Village did not contend that the second floor was not suitable for the completion of the rooms as desired, including the dormer window; nor does the ordinance prohibit their construction thus for living quarters. The objection by the Village, and its restriction, is simply, that when completed as planned, one room may not be *used as a kitchen,* because they say, this will establish a separate housekeeping unit, and which, they say, is *now* prohibited, because the building is *now* in the Zone "A" one-family residence district.

The Supreme Court gave no consideration to, nor benefit of, the fundamental guarantees to the property owner under the Federal Constitution, and thus ignored the general scope of the ordinance as it operated on the fully developed area here involved. The Illinois Supreme Court failed to consider the permissible uses under the ordinance, and that the use proposed, but denied, was no more inimical to the public welfare than the uses *allowed.* The said Court further assumes, in its opinion, as alleged facts, but which nowhere appear in the record, that five lots in the block are vacant, and that 90% of the property in the block is devoted to one-family use.

But the question here is what is a one-family use, and, is that use restricted to *one kitchen.*

The Court based its opinion on general principles of law

relating to the power of a municipality to *zone an area,* whereas this case presents for determination the reasonableness of the restriction in the ordinance, Sec. 35.930, as applied to petitioner's specific existing building *in the area zoned;* and in particular, whether the restriction preventing petitioner from using her property for another housekeeping unit, as the Village interprets the ordinance, bears any substantial and rational relation to public morals, safety, comfort, or welfare (*Harmon* v. *Peoria,* 373 Ill. 599-600).

The other discussions in the Supreme Court opinion on the contentions raised by the arguments of counsel for the Village of Oak Park were not relevant to the issues as made in the case, and it was so pointed out to the Supreme Court of Illinois in the Petition for Rehearing (Tr. 72-88), but the Court adhered to its view *upon the general principles of law, applicable in cases where the construction of a new apartment building* or commercial building upon a vacant lot, in a residence zone, is in question.

Jurisdiction

Jurisdiction of the United States Supreme Court to Review the Judgment of the Supreme Court of Illinois

This Court has jurisdiction to review this cause because of the Federal Constitutional questions involved, and raised by plaintiff, and ruled upon by the highest Court of the State of Illinois, adversely to the contention of the petitioner, and in reversing the decree of the Superior Court of Cook County, which had held the ordinance unconstitutional as applied to plaintiff's property.

Plaintiff's rights under the 5th and 14th Amendments to the Federal Constitution are directly involved, and the Court has jurisdiction.

The Federal question is raised by the pleadings (Transcript of record pp. 4, 9, 12, 14) and by the trial court's decree (Tr. 20) and by the reversal of said decree by the Illinois Supreme Court.

Jurisdiction is invoked under Section 237 (b) of the Judicial Code; 43 Stat. 927; 28 U. S. C. A. Sec. 344(b).

Date of Final Order

The Supreme Court of Illinois denied a Petition for Rehearing on March 17, 1947 (Tr. 89).

On June 9, 1947, Mr. Justice Murphy entered an order extending time to file this petition for certiorari to July 7, 1947.

Questions Presented

Where, at the time a one-family zone is created by ordinance, there exists in the zone a two-story building, the first floor of which is completed as a unit for one family and one room, with stairway thereto, has been built on the second floor; and where such building is so architecturally designed in its roof construction that its upstairs could reasonably be arranged into a three room apartment with living room, bedroom, kitchen, and bathroom, with necessary stairways, air and light, so as to be used for the accommodation of an additional family unit; does the owner have the right, after the passage of the zoning ordinance, to complete the building so as to accommodate it to the use of two family units, where nothing appears in the record to indicate that the public safety, health, morals or general welfare will be thereby in anywise injuriously affected?

Where a building which might of right have been completed as a two-family residence, has been commenced and sufficiently finished to accommodate a one-family unit, and construction thereof has been suspended for convenience of the owner, and occupied and used in the meantime as so

partially completed; and, while so occupied and used, the municipality has passed a zoning ordinance and placed the property on which the building stands in a one-family zone —may the owner, as of right, thereafter complete such building at his convenience so as to accommodate two families, notwithstanding such ordinance; provided public safety, health, morals and public welfare are not injuriously affected thereby?

Where construction of a two-family building has been commenced and partly constructed prior to the passage of a zoning ordinance, placing such property in a one-family residence zone, is the owner's right to complete and use such building as a two-family residence, as such right existed when the ordinance was passed, such a right as is constitutionally protected?

Where no injury is shown coming to anyone, nor any relation to the public welfare, is there still such a condition attached to the constitutionally protected right to the desired use by a family of an existing building, that it must be shown that the property is, by the restriction, diminished in value; and further that the showing must be made by any greater, or by more direct proof, than the common knowledge that the building with one completed apartment is of less value than with the added apartment and added rental income therefrom, as is held by the Supreme Court of Illinois?

Wherein can a restriction, as applied to a building, existing before the enactment of the ordinance, against the use of a room as an additional kitchen, have any relation to public morals and general welfare, where the building is in harmony with the general scope of the ordinance in the area, and the ordinance contains no limitations on the number or relationship of persons occupying said building?

Is an owner of a one-family building in a developed and

built-up district, which is not strictly devoted to one-family residences, protected by the 5th Amendment and 14th Amendment from the impact of a zoning ordinance, which would take away the right of said owner to have within said building an additional kitchen?

Where a zoning ordinance restricts an area to one-family residences, does the municipality have power to restrict such one-family residences to one kitchen in the house?

Where a "family" as defined in a zoning ordinance as

> "any number of individuals living and cooking together on the premises as a single housekeeping unit"

is the municipality justified in arbitrarily denying the head of the family owning the property from arranging his dwelling with an additional kitchen where it does not appear that public health, morals, safety or general welfare will be injuriously affected thereby?

Is the arrangement of a one-family dwelling with two kitchens in anywise injurious to public health, safety, morals or general welfare?

Is the provision of a zoning ordinance void which restricts the right of a family to have only one kitchen in a one-family residence?

Does the police power of a municipality give it jurisdiction to compel a family unit to "cook together as one family unit" when residing in a one-family residence zone?

Reasons for the Allowance of the Writ

I

The restrictions placed by the officials of the Village upon the interior arrangement of petitioner's building, and such use thereof as may be suggested by family convenience, is plainly an unwarranted direction as to where a family, occupying the house, may cook and have their meals; and,

ipso facto, such a regulation of their personal life within the home, is a denial of personal freedom, and in violation of constitutional guarantees.

And the Village of Oak Park in the exercise of its police powers has obviously and plainly and arbitrarily gone far beyond the necessities of the situation, and has placed restraints upon human conduct, under the guise of police powers, when there is no threat to public safety, morals, health, or welfare, to be found in the proposed construction of an additional kitchen, and its use as such.

II

The decision of the trial court and its reversal by the Supreme Court of Illinois raises an important question of Federal law which does not appear to have been heretofore passed upon by this Court.

Zoning cases which have been considered by this Court have involved the determination of the legality of zoning ordinances generally and the power of the municipality to enact them.

This case involves the right of an owner to complete his building within the scheme, plan, or purpose of its architecture and within the scope of the ordinance affecting this built-up district, notwithstanding limitations of a zoning ordinance which was enacted after the building was partly constructed; and where the owner has been denied the right to complete the building, notwithstanding that the public safety, health, morals and public welfare will not be injuriously affected by the completion of said building. That right will be lost unless this Court takes this case for decision.

III

Aside from the right of the owner as protected by the Constitution, a question of immediate public concern is pre-

sented as to the relief of the acute housing shortage now existing.

Aesthetic and Idealistic Zoning Is One of the Causes of the Housing Shortage

While this suit involves only one piece of property, the principle to be decided has wide application for the question to be answered is of immediate concern to thousands of persons seeking housing facilities. If the zoning of whole subdivisions and municipalities is idealistic and aesthetic, having no substantial relationship to public health, safety, morals, or welfare, then a decision of this Court will go a long way toward relief of the present housing shortage by furnishing a welcome basis for urging a constitutional right to arrange additional facilities for other family units in a building adaptable to such change. The cases in the Illinois reports mentioned herein show that many populous centers have districts zoned for one-family dwellings with the same restriction as to one kitchen imposed upon the use of the interior of the building by the whole family unit; although the "family" is unrestricted in number and requires no relationships.

The question is one of great public concern and for such reason this case should be taken for decision.

The Opinion Below

The opinion of the Supreme Court of Illinois is reported as *Angeline DeBartolo* v. *Village of Oak Park*, 396 Ill. 404.

Error Relied Upon

The Supreme Court of Illinois erred in reversing the decree of the Superior Court of Cook County, Illinois.

Prayer

WHEREFORE, petitioner prays that the Court allow this petition and grant its Writ of Certiorari directed to the Supreme Court of the State of Illinois to the end that its said judgment may here be reviewed.

Respectfully submitted,

ODE L. RANKIN,
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BRIEF

I

Statement

Argument, *post.*

II

THE RIGHT TO DEVOTE PROPERTY TO ANY LEGITIMATE USE IS WITHIN THE CONSTITUTIONAL PROTECTION.

Seattle Trust Co. v. *Roberge,* 278 U. S. 116;

Merrill v. *City of Wheaton,* 356 Ill. 457.

III

A MUNICIPALITY HAS NO POWER TO REGULATE FAMILY LIFE BY PROVISIONS OF A ZONING ORDINANCE.

Harmon v. *City of Peoria,* 373 Ill. 594, 602.

IV

WHEN THE VALIDITY OF A ZONING ORDINANCE IS NOT QUESTIONED GENERALLY, BUT ONLY SPECIFICALLY AS TO THE PLAINTIFF'S USE OF THE PROPERTY, BURDEN IS ON THE MUNICIPALITY TO JUSTIFY THE APPLICATION OF ITS ZONING LAW TO THE INDIVIDUAL PIECE OF PROPERTY.

Argument, *post.*

V

WHERE THE APPLICATION OF THE DETAIL OF A ZONING ORDINANCE SHOWS AN INJURIOUS EFFECT UPON PRIVATE PROPERTY THE BURDEN IS UPON THE MUNICIPALITY TO JUSTIFY ITS ACTION BY SHOWING THAT THE BENEFIT TO THE PUBLIC OUTWEIGHS THE DETRIMENT TO THE PROPERTY OWNER.

Argument, *post.*

VI

RESTRICTIONS UPON FAMILY LIFE FURNISH NO LEGITIMATE BASIS FOR ZONING A MUNICIPALITY.

Merrill v. *City of Wheaton*, 356 Ill. 457;
Harmon v. *City of Peoria*, 373 Ill. 594;
Anderman v. *City of Chicago*, 379 Ill. 236.

VII

THE SUPREME COURT OF ILLINOIS DID NOT CONSIDER THE QUESTIONS HERE INVOLVED.

The following cases, decisive of the questions here involved, were ignored by the Supreme Court:

Merrill v. *City of Wheaton*, 356 Ill. 457;
Harmon v. *City of Peoria*, 373 Ill. 594;
Anderman v. *City of Chicago*, 379 Ill. 236.

The following cases, relied upon by the Supreme Court, have no relevancy to the case at bar:

Evanston Best & Co. v. *Goodman*, 369 Ill. 207;
Minkus v. *Pond*, 326 Ill. 467;

VIII

THE RIGHT TO USE ONE'S PROPERTY AT DISCRETION CANNOT BE DENIED IN THE ABSENCE OF INJURY TO HEALTH, SAFETY, COMFORT, AND GENERAL WELFARE.

Seattle Trust Co. v. *Roberge*, 278 U. S. 116;
Womans Kansas City St. Andrews Society v. *Kansas*, 58 F. 2nd 593.

ARGUMENT

I

Statement

The ultimate question here presented is whether the Village of Oak Park may deny to petitioner the right to have a second kitchen in the building on her property which is zoned as a one-family residence district, where a "family" as defined in the zoning ordinance, may consist of "any number of individuals living and cooking together as a single housekeeping unit"; that is—does the restriction to one kitchen to a family, as imposed by the enforcing officials, bear any reasonable relation to the police power; and does such a second kitchen tend to injuriously affect public health, morals, safety or welfare?

The validity of the zoning ordinance of the Village of Oak Park is not questioned so far as it creates a one-family residence zone. This Court and the Illinois Supreme Court are in harmony on the general theory that a zoning ordinance may be valid in its general provisions, but, may violate constitutional rights in its local applications to individual properties, which violations may be remedied as they arise (*Euclid* v. *Ambler Co.*, 272 U. S. 365, 395; *Harmon* v. *City of Peoria*, 373 Ill. 594, 600-601).

The zoning district here in question is a "one-family" district, wherein the dwellings "shall be arranged and designed for the exclusive use of only one family"—a family being defined to be "any number of individuals living and cooking together on the premises as a single housekeeping unit" (Tr. 6).

The definition of a "family," it is seen, is arbitrary and artificial, and is not restricted as to numbers, units, or relationships. It is merely a housekeeping group.

It is contended that the ordinance, as construed by the officials, is arbitrary and unreasonable, in that it restrains and confines the family, as defined, to the use of one kitchen; thus, *compelling such a combination of persons* to cook in one kitchen in order that the building may be considered as being used as a one-family residence.

That question of invalidity of the ordinance is raised by the refusal of the Village Authorities to allow petitioner to complete the upstairs of her building because her plan and specifications show a kitchen that indicates that when completed it would permit the use of the upstairs by a separate family unit.

It is contended by petitioner that the right to so finish the building was an existing right when the zoning ordinance was passed and that the use of the premises by a second family unit, so far as cooking and the use of a kitchen is concerned, does not tend in any substantial or material way to injure public health, safety, comfort, morals or welfare; but on the contrary would be beneficial and tend to promote it, and accordingly, the ordinance as applied to petitioner's residence is void.

The narrow question here is whether petitioner may have a second kitchen in her residence. No objection was made to the plan of the completion, otherwise.

II

The Right to Devote Property to Any Legitimate Use Is Within the Constitutional Protection

It is conceded that the creation of the one-family residence zone here in question is a valid exercise of the police power of the State delegated to the Village.

We dispute, however, that the Village has power to say that a family may not have for its convenience two kitchens

in the one-family home; because there is no reasonable, practical, or substantial relation between that restriction and the basis of police power, public health, morals, comfort, safety, or general welfare.

The artificial family as created by the ordinance has no limitation as to relationship, or numbers, and may consist of more than one family unit; and of wholly unrelated persons; it is just a group of persons required to have *one common kitchen.* It has no other test, no attributes of family life.

As we live in America, and as commonly understood, a family is a household group with a common ancestry, and may include daughters-in-law and sons-in-law and grandchildren, the number varying with circumstances.

How a family may live inside its dwelling, or what facilities it may use in its home life is of no concern to municipal authorities so long as it lives within the law and its mode of life does not conflict with the police power.

Such a requirement *is not a classification but is an unwarranted restraint,* a restriction upon normal family life. It is an attempt to classify by placing a restriction on family life.

Cooking stoves, refrigeration, kitchens, bathroom facilities, bedrooms, are all part of a family home. There is no basis for saying that a one-family dwelling may not have two kitchens, two bathrooms, two bedrooms, or two anything, as may be convenient for the family.

More than one bathroom in a one-family dwelling is now frequently met with; and two kitchens are not uncommon.

Here the sole objection made by the municipality to the proposed completion of petitioner's building is its kitchen arrangement, or the use to which it is proposed to put one room.

But for the use of one room as a kitchen, the Village made

no objection to the proposed completion of the upstairs portion of the building. To put it plainly, the zoning ordinance requires that the common type of family must live inside the dwelling in the manner the *ordinance dictates,* and not as *family convenience may suggest.*

Unreasonable Restrictions Cannot Be Made under the Guise of Police Power

This Court considered the case of *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116 which involved the right of the owner of property, zoned in a residence district, on which stood an Old People's Home building accommodating 14 persons, to construct in its place, a new structure to accommodate 30 persons. The city refused permit solely on the ground that the zoning ordinance required frontage consents of two-thirds of the property owners living within 400 feet of the home.

This Court there held that the municipality could not, under guise of police power, impose unnecessary and unreasonable restrictions upon the use of private property nor prevent useful activities (P. 121), and said that there was nothing in the record to show that the new building would be likely to work "injury, inconvenience, or annoyance, to the community, district or other persons" (P. 122). That holding was followed in *Merrill* v. *City of Wheaton,* 356 Ill. 457.

That rule is here applicable, for the objection to the completion of the building is to the use of a room *as a kitchen* so that it may be used by a second family unit, when the record discloses nothing injurious will result from the proposed change.

The Right to Complete the Building Existed When the Ordinance Was Enacted

The building here was originally designed for extra rooms in the second story as shown by the roof construction (Tr. 49, 55). It could then have had a kitchen upstairs as of right. The right to complete the second story existed when the ordinance was enacted, and the denial of the right to complete it, as requested, was the destruction of that right, and, to that extent, was the taking of petitioner's property without compensation and due process.

The zoning ordinance itself provides for completion of nonconforming buildings.

And in any event, the municipality had no power to restrict the use of petitioner's dwelling unless the proposed use offended against the police power and was in fact injurious to health, comfort, safety, or public welfare.

An additional kitchen, for use of persons admittedly privileged to live as members of the family, is not an offense against the police power.

III

A Municipality Has No Power to Regulate Family Life by Provisions of a Zoning Ordinance

Under the ordinance definition of a family, it is to be noted that there is no limit in numbers, nor is there any relationship of parties required. Any group of persons may constitute such a "family." Within that definition, two or three families, as defined by relationship, could be embraced.

The question is presented whether under such a definition it is reasonable to restrict an ordinary American family group to one kitchen and require them all to cook together in order to use the residence and live in the district. In

other words, is it reasonable to ban the use of two kitchens in the district? We think the definition itself contains a thought repugnant to our way of family life.

We can all agree that if the ban was as to bathrooms, and attendant facilities, that the restriction would be deemed clearly unreasonable; especially where as here the number of persons composing the family is unlimited.

To say that an ordinary American family may not have a second kitchen for the convenience of a second family element, such as a son-in-law and his family group, or daughter-in-law and her group, where the design of the existing house makes it convenient, is to make the *ordinary conveniences of family life* the basis upon which a district may be zoned; or, is to use a zoning ordinance as a guise for the regulation of family life.

That such regulation is arbitrary and unreasonable is shown by the obvious fact that imagination, not to say reason, cannot supply, nor suggest, any relation between such a regulation and public health, morals, safety or welfare.

A family might increase until it overflowed into the street and it would not violate this ordinance; and yet, it could not convenience itself with the ordinary housekeeping facilities.

A Zoning Ordinance Does Not Operate Retrospectively

The restriction of buildings in a "one-family" district to dwellings "arranged and designed for the exclusive use of only one family," pertains, of course, to the *erection of dwellings* in the district *after* the passage of the ordinance, and to maintenance of the existing status.

The zoning law allows the creation by a municipality of a residence district but it never was intended to grant power to a municipality, in zoning a city or village, *to enter*

into family life and regulate the facilities a family may enjoy inside the home, or turn back the clock upon the permissible use and existing design of standing buildings.

A family may consist of many members, and there are some large ones, as all of us know. Obviously, the number of household facilities and conveniences should not be made to depend upon the zone, but should rest in the discretion of the homeowner. Here it was intended by petitioner to receive the new son-in-law into the family as one of its members; and convenience, if not absolute necessity, here justifies the additional housekeeping facilities, as planned in the completion of said building.

Zoning Is Not an Aesthetic Process

Zoning a district for one-family residences is legal; but, legislating how the family may live inside such a dwelling is no part of the police power. Indeed, such interference in family life is not zoning nor the exercise of police power; it is just the injection of the aesthetic ideas of the Village fathers into the home life of the Villagers. Culture is not the objective of the zoning law, but health, comfort, safety and welfare are the grounds of the exercise of the police powers of the State.

It Is the District That Is Zoned, Not Family Life

The "kitchen facilities" classification, injected into the ordinance by the construction given to it by Village officials, is not a *classification* at all. *The classification is one-family dwellings.* It is the restriction upon use of the dwelling for family life under the arbitrary definition of a "family" that is unreasonable and arbitrary, and that *restriction* cannot be made the basis nor test of a one-family *residence zone.*

The Village officials make no objection to granting a permit to complete the upstairs as requested, except only as to the room specified to be for additional kitchen facilities.

The Definition of "Family" Has No Relation to Police Power

The Supreme Court of Illinois itself recognizes that a "one-family dwelling," as here defined, bears no relationship in fact to the number of persons, nor the number of families, living as a "family" in a one-family dwelling. In *Harmon* v. *City of Peoria,* 373 Ill. 594, 602, the Illinois Supreme Court was passing upon a zoning ordinance with the same definition of "family" as is found in the Oak Park ordinance here in question, and said:

> "Indeed any number of persons may occupy a house as a 'family' within the contemplation of the ordinance, and divide the housekeeping expenses, provided only they live as a solitary housekeeping unit, using a single kitchen. Manifestly, the term 'one-family dwelling' bears no relation in fact to the number of persons or families living in a building."

In that case the Supreme Court *approved three kitchens* where the design of the building would accommodate that number, although it was in a one-family residence zone.

And that is necessarily true here for the ordinance says, in so many words, that a family is "any number of individuals" living together as one unit. There may be the parent family, sons, daughters, the sons-in-law, the daughters-in-law, and the grandchildren; but numbers, and the number of family units, receive no consideration under the Oak Park Ordinance as the Village says there must be but *one kitchen,* and that, without reference to the number of family units, or persons in the family.

Palpably that provision is unreasonable; for all reason and logic says that public health, morals, safety, and general welfare would be promoted, rather than injured, by allowing a second kitchen for a new family unit; and that is our American way of life.

Certainly, it cannot be said that allowing any number of persons who may consist of several family units to live together as a "family" and yet restricting them to cooking in one kitchen promotes health, morals and general welfare.

The arbitrary definition of a "family," as used here, as a basis of zoning, leads naturally to restrictions upon normal family life, and here the municipality is enforcing that restriction—not to the letter—but beyond both spirit and letter.

The basic idea of zoning does not contemplate placing *restrictions* upon the use of ordinary family conveniences, nor to descend to regulation of family life. The home is the castle so far as municipal authorities are concerned. They may zone the territory, or district, but may not restrict normal family life inside the home while so doing.

IV

When the Validity of a Zoning Ordinance Is Not Questioned Generally, But Only Specifically as to the Plaintiff's Use of the Property, Burden Is on the Municipality to Justify the Application of Its Zoning Law to the Individual Piece of Property.

As to the fundamental question here to be answered it may be confidently stated that the proposed completion of the upstairs of petitioner's house will not operate in any perceptible degree to injuriously affect the immediate neighborhood in question, or its zone. The fact is patent,

obvious. The physical facts demonstrate it. The only visible exterior change will be the building of a dormer window in the South exposure of the roof. But a glance at the architecture of the period as shown by the other houses on the street, each an individualistic example, shows that such a window is more in conformity with the prevailing architecture than against it. (See pictures Tr. 51, 53, 55, 57, 59.) Who, here, is in a position to complain about the architectural appearance of his neighbor's house?

The Village by defending on the one point that it will not permit additional kitchen facilities in the construction of petitioner's building necessarily concedes that a second family use of said building will not burden the public facilities of water and sewer, or electricity, light or air. There is no overcrowding, no objective change, no improper use, upon which it may be said that the proposed use would injuriously affect the public health, safety, comfort, morals or welfare. The Village presented no evidence, and did not attempt to justify its position except to point to its zoning ordinance.

On the contrary, it may be reasonably said that to allow the premises to be adapted to the use of two families will be conducive to public convenience, comfort, health, and welfare. Obviously, the zoning laws cannot be administered from a purely aesthetic viewpoint. They must be practically dealt with. So where the proposed use is not out of harmony with the type of life in the zone, will offend no one, will be no appreciable burden on public facilities, and where the completion of the building will contribute to the convenience of family life, and relieve to that extent, the great housing shortage, reason and logic say the change should be allowed, and, welcomed.

V

Where the Application of the Detail of a Zoning Ordinance Shows an Injurious Effect upon Private Property the Burden Is upon the Municipality to Justify Its Action by Showing that the Benefit to the Public Outweighs the Detriment to the Property Owner.

Here the only justification shown by the Village was that it was the duty of the authorities, as it pleaded, "to uphold the zoning laws of the Village of Oak Park and to enforce them in order to prevent encroachments which blight and destroy neighborhoods by permitting violations contrary to the intent of the zoning laws" (Tr. 14). But the Village makes no effort to show that the allowance of kitchen facilities on the second floor would, in anywise, injuriously affect public health, comfort, safety, morals, or welfare. Obviously a multiplicity of kitchens would injure no one.

Certainly the burden was on the Village to show that the denial of ordinary family facilities had some basis in the police power. There can be no presumption that a municipality has power to restrain the owners of an existing building from making ordinary use of it, like having an extra kitchen; and, there being no such presumption, the Village necessarily had, in some way, to justify its restriction upon the use of the property for ordinary household purposes.

The Village made no such showing, and offers no justification beyond the fact that it has so ordained. But a zoning ordinance *does not justify itself* as to its application to individual pieces of property when it is challenged as being arbitrary and unreasonable, and the physical facts are shown.

Here the interference with the ordinary use of the building was shown, but the Village offered no justification. It

merely confessed that it had so ordered and demurred, raising a question of law only.

As the Village showed no facts to justify the exercise of the police power, in forbidding an extra kitchen in a one-family dwelling, the trial court correctly ruled that the ordinance was void in that respect as applied to petitioner's property. For if there was no police power, there was no authority.

VI

Restrictions upon Family Life Furnish No Legitimate Basis for Zoning a Municipality

The particular blocks here involved are only a fraction of the one-family districts of the Village of Oak Park; and the reports show that other municipalities use the same definition of "family" for the group of persons who may occupy a "one-family dwelling," from which, it is seen, that the question here presented applies broadly, if not generally; and petitioner's property is not an isolated case of family restriction.

In the case of *Harmon* v. *City of Peoria*, 373 Ill. 594, the same definition of "family" and "boardinghouse" is there used as here and, as applied to the house there in question, it was held that three separate housekeeping units, *three kitchens*, for three family units, in a one-family residence zone, was no more inimical to public welfare than the accommodation of one family with the permissible four roomers and boarders there allowed; and such *restriction*, it was held, bore no relationship "in fact to the number of persons or families living in a building" (p. 602).

In *Merrill* v. *City of Wheaton*, 356 Ill. 457, where the same definition of "family" was used, it was held discriminatory and unreasonable, where the owner was changing her one-family house to accommodate two families, and

where, next door, a building could be used for twenty-eight persons; and yet she could not, under that ordinance, have two families, of two persons each, in her building. There, the Illinois Supreme Court cited *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116, as authority for the statement that unnecessary and unreasonable restrictions upon the use of private property, or pursuit of useful activities, could not be imposed by the lawmaking authorities under the guise of the police power, and the classification there based upon family life, was there held void (356 Ill. 457, 458, 460).

In *Anderman* v. *City of Chicago,* 379 Ill. 236 it appears that the Chicago zoning ordinance defines a "family" as "one or more individuals living, sleeping, cooking and eating on the premises as a single housekeeping unit" (p. 238). It was there held that such a classification was unreasonable in view of the unlimited number of persons that could compose a family and reside in a residence, and, in view of the collateral, or auxiliary, or permissible uses, "the restriction against the use by two separate families, with separate kitchens and bathroom facilities is arbitrary and unreasonable" (p. 243).

In each of those three cases other circumstances were present to *accentuate the rule,* but, the classification of a residence zone by the arbitrary definition of a "family" was held void. Of course the court would not go beyond the case before it, as to constitutional questions, but its holding is clear and unmistakable that a one-family residence zone cannot be based upon restrictions against the use of separate kitchen facilities. Restrictions when thus applied, *are not classifications* and all such *restrictions* are unreasonable and void.

The Question Is Not Local, But General

The question raised here is not local, nor restricted to the specific piece of property here in question. It involves all the residential districts of the Village of Oak Park; and not only Oak Park, but the City of Chicago, the City of Peoria and the City of Wheaton as shown by cases in the Supreme Court of Illinois, herein cited.

The Supreme Court of Illinois has three times held such a classification, when used as a basis for zoning one family residence districts, to be void (*Merrill* v. *City of Wheaton*, 356 Ill. 457; *Harmon* v. *City of Peoria*, 373 Ill. 594; *Anderman* v. *City of Chicago*, 379 Ill. 236). Of course, the court went no further than the property before it, but definitely it has held as a controlling consideration that such a classification was void. In those cases the other conditions, all arising from the fact that the character of the zone was formed, as here, before the zoning ordinance was enacted, were considered, but those conditions only *accentuated* the necessity of the ruling. For no matter what the type of the building, an additional bathroom, an additional kitchen, or sleeping room, *were matters of right*, if the architectural design would permit, and the structural design would tolerate; and especially here where no injurious effect is shown coming to anyone.

Here for a good reason, an urgent reason, petitioner desired to finish out the skeleton of the inside of the second story for her daughter and her fiance, the returned veteran, to reside in when married.

Public Convenience and Necessity Require That This Court Decide the Question Here Presented

It might be suggested that but for the unreasonable restrictions imposed by the type of zoning ordinance here involved, where the only real question is the right to use, in

the home, an additional kitchen, the current housing shortage could be materially relieved. Of course, people are normally obedient to ordinances, and assume their validity, and municipal officials assume that they have an overwhelming duty to enforce their ordinances to the letter, and without due consideration to the owner's rights protected and guaranteed by the Federal Constitution. Thus, little is done about it; but we suggest that public convenience and necessity require that this Court take this case for decision. It will break the jam and point a way for additional housekeeping facilities. Municipal officials will follow the suggestion in such a decision, and re-zone, or allow modifications as applied for, in conformity with the constitutional rights of the owner.

VII

The Supreme Court of Illinois Did Not Consider the Questions Here Involved

The Supreme Court of Illinois ignored its prior decisions, made at least in three cases (*Merrill* v. *City of Wheaton,* 356 Ill. 457; *Harmon* v. *City of Peoria,* 373 Ill. 594; *Anderman* v. *City of Chicago,* 379 Ill. 236), that a house located in a district zoned for one-family residences could not be restricted to a single kitchen, for the reason that such prohibition

> "bears no rational relation to the protection of the public health, morals, safety and general welfare. As applied to plaintiff's property the ordinance is void" (*Harmon* v. *City of Peoria,* 373 Ill. 594, 602).

The Supreme Court of Illinois explained those three cases by stating simply that these cases

> "involved small tracts zoned for residential use, which were surrounded by property zoned for commercial use" (Tr. 68).

That is true of the *Anderman* case only; but that does not negative the holding made in that case, based on the *Harmon* case, that the restriction of a family to one kitchen in a one-family residence zone was an arbitrary and unreasonable restriction, and therefore unconstitutional.

Obviously, the size of the zoned tract has no reasonable relation to the arrangement of the interior of the building for housekeeping purposes. The protection to the property owner, guaranteed by the Constitution does not depend on whether or not the building is located in a small tract; nor on how much "surrounded" the tract need be, by commercial zones. No such rule of law is to be found in any of the prior decisions of the Illinois Supreme Court; nor in any decisions of other jurisdictions, nor of this Court.

The Supreme Court of Illinois for some reason, not at all obvious, stated that:

> "The situation as to the property of plaintiff in this case is quite similar to the situations prevailing in Evanston Best & Co. *v.* Goodman, 369 Ill. 207, and Minkus *v.* Pond, 326 Ill. 467. These cases seem to dispose of plaintiff's contentions on every question raised in this case" (Opinion Tr. 67).

But these cases are wholly different from the case at bar. In *Minkus* v. *Pond,* 326 Ill. 467, there was involved the erection of a new three-story, thirty-three apartment building on vacant lots, in an area zoned for one-family residences. And *Evanston Best & Co.* v. *Goodman,* 369 Ill. 207 involved the right to erect a commercial building on vacant lots in a "B" residential zone. Palpably, those cases bear no similarity in neither principle nor fact, with the case at bar and reliance upon them indicates that the Supreme Court of Illinois must have entertained an erroneous conception of this case, where there is involved only the right

of an owner and head of the family to have two kitchens in a house, in existence before the enactment of the ordinance; and where the definition of a "family" has no limits as to numbers or relationships.

Apparently, the Illinois Supreme Court decided the case at bar from the viewpoint that petitioner was challenging the right of the municipality to zone, as a one-family residence district, the area in which petitioner's property is located—and thus the said court fell into error, in the determination of the constitutional question here involved. For nowhere has petitioner contended that the ordinance is unreasonable because Roosevelt Road—50 feet to the South—is zoned for commercial purposes, and because of the proximity of the apartment zones and apartment buildings. Petitioner has not maintained that her property should have been included in the apartment zone; nor that it was unreasonable to have zoned Roosevelt Road as commercial and then stop at the alley. Such are the propositions involved in the cases relied on by the Illinois Supreme Court; and not the right of an owner to use one of the permissible rooms in an existing building for an extra kitchen.

Those cases have therefore no relevancy to the case at bar, where the issue is not the proximity of the neighboring zones, not the erection of a new building out of harmony with the general scope of the zoned area, and not even the addition of a second story, over a one-story building; but plainly and only the right of petitioner to have in her *existing building in the area zoned,* the use of another kitchen. It is the denial of this right by the Village that goes too far, and which is within the ban of the constitutional guarantees. The apartment buildings in the same block and other blocks in the area, the close-by apartment zones, gasoline filling station and other commercial buildings and commercial

zone, only accentuate the answer to the statement by the Village that the use of the additional kitchen facilities in this residence will, as they say, "blight the neighborhood."

In the case at bar, the trial court found that the restriction in the ordinance, as thus imposed on petitioner and her property, is not necessary for the promotion of public health, morals, safety or general welfare. The necessary basis for the support of the invasion of the property of plaintiff is wanting, and the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained (*Nectow* v. *City of Cambridge,* 277 U. S. 183).

The trial court, following prior decisions of the Supreme Court of Illinois, gave plaintiff relief from such unjust, arbitrary, and unreasonable provision of the zoning ordinance on the facts as they exist; but, unfortunately for petitioner, the Supreme Court of Illinois has now placed its decision upon a wholly different theory; and in direct opposition to other of its well considered and sound decisions.

This Court should therefore take this case to correct the error of the Supreme Court of Illinois which, if allowed to stand, will take petitioner's rights and property without due process or compensation; and many others in Illinois, who are similarly situated, will likewise have their property rights similarly destroyed.

VIII

The Right to Use One's Property at Discretion Cannot Be Denied in the Absence of Injury to Health, Safety, Comfort and Welfare.

It is suggested that the case of *Washington ex Rel. Seattle Title Trust Co., Trustee,* v. *Roberge, Superintendent of Buildings, etc.,* 278 N. S. 116, has substantially decided the

point here raised. There, an Old People's Home building was located in a district zoned for single families and there was a provision in the ordinance permitting the construction of such a home if the consent of two-thirds of the property owners within 400 feet should consent to such structure. The Trustee proposed to construct a new building to house 30 persons to take the place of the old structure which was for 14 persons. Without the consents required by the ordinance, the permit was refused, and suit followed.

The only defense interposed was that no consents were given by the property owners as required by the ordinance. This Court held that the requirement of the ordinance as to frontage consents was void when it did not appear that the proposed building and its use would be inconsistent with the public health and welfare, and the restriction as to consents was therefore beyond the police power of the municipality to exact. And here, where the only defense is that the completion of the building with a second kitchen would allow the building to house two families, the answer is that the definition of a "family" in the ordinance may include several family units, and the municipality has no police power to forbid the owner of a property from having more than one kitchen inside his house, and that such a restriction has no rational relationship to the police power.

IX

It Is Not Necessary to Prove the Obvious

The question of increase or diminution in value of the premises in question as commented on by the Supreme Court of Illinois has no place in this case. The question here is one of *right* of a person to use the interior of a house as *desired* and within the general scope of the ordinance, in the zoned area, without injury to anyone. If the question

of value were at all relevant, the fact that a second story was to be finished supplies the answer. It is not necessary to prove, what we all know without proof, and that which is common knowledge.

Conclusion

It is respectfully suggested that the questions raised here are substantial, and petitioner has been deprived of a right guaranteed by the Federal Constitution which will be surely lost to her if this Court does not take the case for decision.

WHEREFORE, it is suggested that the record is such that in the exercise of the discretion reposed in this Court the writ of certiorari be granted and the cause reviewed.

All of which is respectfully submitted.

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